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MICHIGAN LEGAL STUDIES: A REVIEW

*Max Rheinstein**

TO THE knowledge of this reviewer, the relation between printers' wages and the development of the law has not yet been investigated. This problem is by no means so absurd as it may sound. The very principle of *stare decisis* presupposes the existence of the printing press, a high development of the art of indexing, a well-organized book trade and a price level under which reports and search books are accessible to the members of the legal profession. Treatises and other learned discussions cannot influence legal developments where printing costs are prohibitive. Yet, the extent to which a legal system is subjected to the critical discussion of textwriters is apt to exert a profound influence upon the methods and contents of the law itself.

A comparative survey of the legal systems of the world is apt to reveal that the influence of scholarly writing has been particularly strong in those legal systems whose unity has not been safeguarded by a central supreme court. England could dispense with scholarly writing as long as the unity of the common law was guaranteed by the House of Lords and the Judicial Committee of the Privy Council. In Germany, Italy or pre-revolutionary France, as long as legal developments were not channelized by any central supreme court, hopeless disintegration of the law was only prevented by the professors and textwriters. A great American judge has observed the growing importance in American law of learned discussion in treatises and articles. It is hardly a wild guess to assume that some connection exists between that fact and the absence in the United States of a supreme court of law and equity.

The growing scope and importance of extrajudicial legal writing could not fail to exert an influence upon the style and *gestalt* of American law. It tends toward greater coherence and greater depth, it shows a tendency of continuously refining its techniques and its conceptual tools, and it reveals a deep concern both for the redefinition of its political and philosophical bases and for the investigation of minutiae of detail. Lawyers enamored with the case-law traditions of the common law may, perhaps, view with mixed feelings this growing influence of theoretical writing, but the existence of the trend cannot be overlooked. The growing number of law reviews, treatises and re-

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statement volumes talks loud enough, not to speak of the ever-increasing number of references to such writings in judicial decisions or the change of style in those very decisions, a good many of which are not only replete with those distinctive works of learned writing, the foot-notes, but also read more like law review essays than like decisions of the old common-law tradition.

However, one type of legal writing, which is abundantly represented in European countries, has been conspicuously absent in the United States, viz. the legal monograph; and this is where the cost of printing and printers' wages come in. Due to them, publication of legal writing has been limited in the United States to treatises for which a wide market has been available, or, at least, has been hoped for, and to that unique and peculiar American institution, the law review, which has its financial foundation in its connection with an educational institution. There has been no place, however, for the treatment of a topic which is too small in scope to attract a lucrative market, but too large in size to be compressed into the maximum thirty or forty pages of a law review article. That there exists a need for this type of publication cannot be denied; however, the need cannot be fulfilled until funds are available to finance patient and time-consuming research as well as printing and publication. For reasons which it might be fascinating to analyze, the science of law has been less able than other sciences to attract benefactions for the purposes of research and publication. One of the few institutions which have been fortunate enough to obtain funds for such purposes is the Law School of the University of Michigan, and the first volumes of its series of legal monographs, entitled *Michigan Legal Studies*, testify to the good use that institution has been making of its exceptional possibilities.

The three volumes of studies which this reviewer has before him present themselves in a most attractive form. They are pleasant to look at in their dark-blue linen covers with the gold lettering, they are printed in a type which is both pleasing and easy on the eye, they are well indexed, in short their outward appearance is dignified and promising of a learning which is solid, but practical rather than esoteric.

REVIEW OF ADMINISTRATIVE ACTS¹

Mr. Uhler's book on *Review of Administrative Acts* in France deals with a topic which is of acute interest in the United States. In

¹ REVIEW OF ADMINISTRATIVE ACTS. By *Armin Uhler*—attorney, National Labor Relations Board. Foreword by *E. Blythe Stason*—Dean, University of Michigan Law School. Chicago: Callaghan & Co. 1942. Pp. xxi, 207. \$3.

both countries the authors of the constitutional framework established the executive and the judicial branches of the government as independent of each other. However, in the United States this scheme was motivated by the founding fathers' desire to protect individual freedom against governmental encroachment, and the original co-ordination developed into a subordination of the administrative agencies of the government under the judiciary. The men who overthrew the *ancien régime* in France had a different notion of democracy. To them it was that system of government in which all branches were at all times susceptible to the will of the people. Through the vicissitudes of French political developments the legislature finally emerged as the center of power whose will was to be final and unlimited. The judiciary was assigned a rather humble rank from the very outset.

Experiences of the past, which are briefly related in Mr. Uhler's opening chapter, made the judiciary appear to the French revolutionaries as a reactionary and undemocratic clog on the effective actualization of the popular will through the executive branch of the government. Hence, early revolutionary enactments solemnly enjoined the judiciary from any interference whatsoever with the course of public administration. In order to put teeth into this principle, it was not only provided that no actions could be entertained in the courts against the state as such, but judges were also threatened with the penalty of degradation or loss of office when they should dare deliberately to interfere with administrative matters by entertaining law suits or granting executions against individual officers. This principle of freedom of the administration from judicial interference was taken over into all successive forms of government, by Bonapartists and Royalists as well as by the Second and Third Republic. It suited monarchist governments just as well as parliamentary majorities. However, the principle of separation of functions between administration and judiciary was not meant to imply that the administrative officials were to be free to follow their own arbitrary discretion. They were to be subject at all times to the rule of law as expressed in the acts of the legislature. Only the control of legality was to be exercised not by judges but by the heads of the administrative departments, who, in turn, were to be responsible to the legislature.

The post-Revolutionary history of French administrative law is the history of the gradual development of other controls in addition to the parliamentary control, which turned out to be too heavy a weapon for everyday affairs. The most important development was the growth of courts within the framework of the administration, espe-

cially of the so-called "section of contentious affairs" of the Council of State as an institution which has become a full-fledged court in every respect except in name. In addition, entrusting a certain amount of supervisory powers to the ordinary courts could not be avoided. In criminal prosecutions for violations of administrative regulations the courts were faced at the very outset with the problem of investigating the legality of a regulation allegedly violated. They also could not avoid becoming concerned with damage suits against a public official because of harm caused to an individual by the official's alleged overstepping of the limits of his official powers. Obviously, such law suits were bound to give rise to delicate problems of demarcation between the proper functions of the administrative organs of control and the courts, and a sizable body of rules was gradually developed on this topic. When public opinion in France, in this respect ahead of that of the United States, compelled the state to assume responsibility for officials harming an individual through an improper exercise of public power, there arose acute questions not only of how to determine the limits of governmental liability but also of allocating the power of adjudication to the courts or to the Council of State. The latter problem was solved by a complicated compromise, primarily in favor of the Council of State, which, ousting the courts from the bulk of litigation arising out of government contracts, came to add to its other functions those exercised in the United States by the Court of Claims.

It seems to this reviewer that some such arrangement as the one just indicated is necessary to make the French materials fully understandable to American readers and to render the French experiences usable for future American thought. The author of the present book has preferred, however, not only to arrange his materials in the traditional French manner but also to present them within the French conceptual framework. Such a presentation is no doubt valuable, but the suggestiveness of the French experience and experiments could be considerably increased if the author had started out with the problems which were to be solved and which, in several respects at least, are similar in the United States and in France. Mr. Uhler has succeeded in clarifying the basic differences between the political structures of France and the United States and in explaining some of the causes of the different appearance of the very problems to be solved. It must be doubted, however, whether his mode of presentation will enable his readers to draw all the parallels and to see all the suggestions the French developments may hold for the solution of the American problems.

Minds—and emotions—in this country are not agitated about the problems of how government contracts should be treated or under what peculiar circumstances damages might be obtained from public officers. The present excitement is centered around the problem of what methods can be devised to safeguard the essential individual liberties in a society where vital common tasks cannot be carried on in any way other than through an efficient administrative machinery of the state. Towards the solution of this problem, which is common to all modern democracies, the French Republic has made a suggestive contribution in its system of supervision of the administrative agencies by the administrative courts. However, the chapter dealing with this feature of French law is the shortest of Mr. Uhler's book. As a matter of fact, we are given in it no more than an outline of the French conceptual framework; we are not told any cases and we receive no information about the important factor of personnel.

A detailed presentation of the problems which have come up before the Council of State and the lower administrative courts, of the decisions rendered and, quite particularly, of the procedure applied might have enabled American readers to form some judgment as to the effectiveness or, perhaps, lack of effectiveness, of the French system. From all we know, it seems to have worked quite satisfactorily. This widespread satisfaction was partly due, of course, to the design of the machinery, but part of the success must also be sought in the character of the personnel by which the machinery was worked. Not only the judges of the administrative courts but also the officials of the "active administration" of France have traditionally been lawyers in the sense of men who have enjoyed a full legal training. This feature alone was apt to infuse a legalistic bent into the French administration. In addition, this personnel was traditionally recruited from the upper classes of society and it was imbued with an *esprit de corps* and a conservative tradition which did not drive its members towards any measures smacking of radicalism. The typical French administrator was a dignified gentleman of good breeding, who was anxious to maintain pleasant social contacts with the intellectually and economically leading classes, a bureaucrat who insisted on the minute observance of all the rules and regulations, especially of procedure, and, all in all, a man whom those groups who are most deeply agitated about the recent development of public administration in the United States had little reason to distrust. A book that hardly at all touches upon this factor of personnel, whose main parts are devoted to problems which do not readily come to the American mind when it reflects

upon the problem of review of administrative acts, and which does not show how review by administrative courts works, does not exhaust the subject matter, solid and accurate as it is as to the topics presented.

THE AMENDING OF THE FEDERAL CONSTITUTION²

The book of Professor Orfield of the University of Nebraska deals with a problem which holds a more acute practical interest than might appear at a first glance. Not only have problems connected with the process of amending the Federal Constitution come up in a number of comparatively recent cases, but there have also been carried on extensive discussions as to the alteration of the present methods of procuring constitutional amendments, which culminated in 1938 in hearings before a subcommittee of the Senate Committee on the Judiciary. These hearings were a direct result of President Roosevelt's proposal in 1937 concerning an increase in the size of the United States Supreme Court. Indirectly the present interest in the amending process is caused by the turbulent nature of our period, which causes the conservative to pine for additional safeguards against change and the "progressive" (or by whatever other name we may choose to call the conservative's counterpart) to wish for easier ways of adapting the political structure of the nation to changing social conditions or simply to desire a more responsive safety valve against the danger of revolution.

The problem of amending a constitution is simultaneously a question of law in the strict sense of the lawyers' terminology and a problem of the ultimate reaches of political theory, as signified by the perplexing term "sovereignty." In addition, it is full of explosive political dynamite. It is no wonder that its discussion has often been characterized by methodological confusion. It is the distinct merit of Professor Orfield's excellent work that the methods of legal discourse, of discourse of political theory and of discourse of practical political expedience are neatly kept apart. This methodological tidiness is particularly conspicuous in the chapter on sovereignty, which appears to this reviewer as one of the clearest, soberest and best considered discussions of this ticklish subject, both in the general theoretical examination of the concept of sovereignty and in its application to the United States.

² THE AMENDING OF THE FEDERAL CONSTITUTION. By *Lester B. Orfield*—Professor of Law, University of Nebraska; author, "Criminal Appeals in America." Foreword by *Henry M. Bates*—Dean Emeritus, University of Michigan Law School. Chicago: Callaghan & Co. 1942. Pp. xxvii, 242. \$3.

In his chapters on the "Procedure for Amending the Federal Constitution," on the "Scope of the Amending Power," and on "Judicial Review of Validity of Amendments," Professor Orfield has comprehensively and critically reviewed the existing literature and the cases decided in both federal and state courts, and has proved convincingly the fallacious nature and imprudence of all attempts to limit the scope of the amending power or of subjecting it to the same degree of judicial review to which acts of ordinary legislation are subjected. The recent tendency of the Supreme Court to regard problems connected with the validity of constitutional amendments as political rather than legal appears to Professor Orfield as a wise exercise of judicial self-restraint. The author's critical survey of recent proposals to amend the amending process culminates in the statement that the present system comes probably as near to a sound compromise between the "too easy" and the "too difficult" as can reasonably be expected.

TORTS IN THE CONFLICT OF LAWS³

This monograph of Professor Moffatt Hancock of the University of Toronto Law School is the most comprehensive, most extensive and most up-to-date survey of the problems of tort liability in conflict of laws so far published in English. As a Canadian, the author has not limited himself to the laws of the United States but has included in his treatise the case law and literature of Great Britain and the dominions. Within the troublesome field of conflict of laws, the law of torts lends itself particularly well to monographic treatment. The issues at stake are simultaneously simple and subtle enough to present a challenge for the elaboration of a methodology of conflict of laws problems in general. As is to be expected of a thoughtful scholar of the younger generation in general, and a student of Professor Yntema's in particular,⁴ Mr. Hancock has ranged himself with the opponents of the so-called mechanical jurisprudence, which has

³ *TORTS IN THE CONFLICT OF LAWS*. By *Moffatt Hancock*—Assistant Professor, University of Toronto School of Law. Foreword by *Hessel E. Yntema*—Professor of Law, University of Michigan Law School. Chicago: Callaghan & Co. 1942. Pp. lviii, 288. \$3. The more extensive discussion of this book is simply due to the fact that it deals with a group of problems in which the reviewer happens to be particularly interested.

⁴ Professor Yntema himself has prefaced the book with a challenging statement of the task with which students of the conflict of laws are now confronted, viz. the task of finding a new synthesis between the legitimate aspirations of each state or country to preserve its own social policies and the need for international collaboration in a narrowing world.

wrought even more havoc in conflict of laws than in any other branch of the law, the law of future interests not being excluded. Mr. Hancock does not mean to justify, but only to explain, the predominance of this method in conflict of laws when he points out the comparative rarity and novelty of the problems and their peculiarly subtle nature. All through his book Mr. Hancock emphasizes the necessity of approaching problems of the conflict of laws in that method which is slowly being accepted in other fields of the law, viz. the method of analyzing the interests and issues at stake and consciously choosing between conflicting social values. The problem of determining the standard by which those value judgments are to be determined is not discussed by Mr. Hancock. He tacitly leaves it to general jurisprudence, to which it properly belongs. The question must be asked, however, whether Mr. Hancock has gone far enough in the application of the method which he advocates.

The various theories which have traditionally figured in decisions and textbooks are all shown to be insufficient or irrelevant. However, in his own solutions Mr. Hancock rarely disagrees with the prevailing opinion, according to which problems of the law of torts are practically always to be decided in accordance with the law of the "place of wrong." Every other solution is declared to be unjust and inequitable. But the only ground upon which Mr. Hancock explains the injustice of other solutions is the fact that, being contrary to the prevailing rule, it would disturb the principle of uniformity of decision.⁵ Apart from the question whether uniformity of decision is really the principal end of our present system of conflict of laws, an explanation is called for why the unifying principle ought to be constituted by the place of wrong. This principle may be perfectly appropriate, but in a work which is devoted to the application of the jurisprudence of

⁵ "... ordinary notions of justice and equity suggest the desirability of uniformity in the settlement of legal controversies, wherever they may be litigated. Since each jurisdiction has different laws, courts have devised a number of choice-of-law rules which attempt to allocate the decision of each individual case to a particular legal system. One of these rules is that matters of tort liability ought to be referred to the law of the state where the alleged tort occurred. For the sake of uniformity this rule ought to be followed. If a court, in a given case, refuses to follow it and applies the internal law of the forum, the resulting decision will be inconsistent with the general choice-of-law practice and *therefore* [italics by the reviewer] unfair to the party who would have succeeded had the choice-of-law rule been adopted. If that party is the plaintiff he may still be able to succeed elsewhere. If he is the defendant, however, he will be forced to pay damages according to the unjust judgment and will be unable to do anything more about it." Hancock, p. 59.

interests to conflict of laws a more extensive explanation might be expected.

The English historical background, which is lucidly presented by Mr. Hancock, seems to indicate that the early English cases were motivated by the desire not to subject a defendant to a liability with which he could not reckon when he engaged in the conduct later complained of in the courts of a state other than that in which he acted. The very same idea could be shown to lie at the basis of those statements of continental writers, whose doctrines, through Joseph Story, came to be accepted in the United States. The formula which is now so widely used in the United States and which postulates that problems of tort are "governed" by the law of the place of wrong was developed in cases dealing with conduct actionable under the law of the forum but legitimate at the place of acting. It is by no means self-evident that justice demands the application of the same formula to cases where conduct is actionable at the place of acting but legitimate at the forum, or to cases where conduct is legitimate at the place where it is carried on but actionable at the place where the plaintiff has suffered his harm.

The only reason the author adduces for the application of the place-of-wrong formula to the cases where conduct is actionable at the "place of wrong" but legitimate at the forum is the desirability of preventing a plaintiff from shopping around for the forum most favorable to him. But are the consequences of such a possibility really so sinister? Ordinarily a person will be sued at that place with which he has the most intimate contacts, i.e., legalistically speaking, his domicile. If the domicile declares a certain line of conduct to be legitimate, it will probably have some good reasons for so doing. Why should it subject to liability for such conduct one of its domiciliaries merely because some other state regards the conduct as actionable? Of course, under the irrational rules of jurisdiction which presently prevail in the United States, a defendant may be sued in a state with which he has no contact other than that of his just happening to be there when a process server catches up with him or where, if the defendant is a corporation, it happens to be engaged in some business activity totally unconnected with the harm complained of. But what additional wrong is being done to a defendant when he is sued in such a state and that state happens to have the same rules as the state of the place of the tort?

Those who, like the author, generally agree with the place-of-wrong rule can hardly find fault with a decision which agrees with

that result. The first rule in *Phillips v. Eyre*⁶ is perhaps not quite so anachronistic as the author believes it to be. Perhaps, present-day conflict of laws is not so ambitious as to aim at universal uniformity of decision. Perhaps, courts are still naive or nationalistic enough to assume that the application of any law other than that of their own respective states or countries needs some justification stronger than a desire for international collaboration towards universal uniformity of decision. Such a strong justification for the application of a foreign law exists where the application of the forum's own law would run counter to the justified expectations of a party. This motive seems to me to lie at the bottom of the English doctrine, as expressed in *Phillips v. Eyre*, just as it seems to be the basis of those few cases in which the Supreme Court of the United States has declared the application of a state's *lex fori* to constitute a lack of due process of law. The application of the Texas law in *Home Insurance Company v. Dick*⁷ or in *Aetna Life Insurance Co. v. Dunken*⁸ was undue process of law because under the circumstances of the case the parties had no reason to expect that Texas law would ever have anything to do with their rights. For similar reasons it was held to be relevant in such automobile cases as *Scheer v. Rockne Motors Corp.*⁹ to ascertain whether the defendant had reason to assume that his car might be driven into the jurisdiction under whose law he was sought to be held liable.

The history of the conflict of laws both on the European continent and in England seems to indicate that it was primarily developed for the end of protecting justified expectations. The more ambitious aim of producing universal uniformity of decision was not totally absent but did not become serious and conspicuous before the middle of the nineteenth century. The vigor with which it was then emphasized was responsible for the sudden appearance of such problems as those of the *renvoi* or of classification. But it can hardly be overlooked that the desire for universal harmony of decision was stronger with the theoreticians than with the courts, which were quite satisfied with the more modest aim of preventing flagrant injustice in individual cases. This discrepancy may be responsible for a great deal of the confusion presently existing in the conflict of laws. Such an order of ideas may also explain the existing differences between the English and the

⁶ L. R. 6 Q. B. 1 (1870).

⁷ 281 U. S. 397, 50 S. Ct. 338 (1930).

⁸ 266 U. S. 389, 45 S. Ct. 129 (1924).

⁹ (C. C. A. 2d, 1934) 68 F. (2d) 942.

American approach to tort cases. The desire for uniformity of decision is obviously stronger in a country where the center of interest is held by "interstate" cases than in a country where "international" cases constituted the prototype, at least in the period in which was developed that approach which the principle of *stare decisis* has tended to perpetuate.

Recognizing the very *raison d'être* of the conflict of laws in that principle which, by enforcing promises, appears as the very foundation of the whole law of contracts, or which, by forbidding *ex post facto* laws, figures prominently in the bill of rights, i.e. the principle that justified expectations ought to be protected, does not exclude the taking into consideration of other interests in conflict of laws cases. Among the interests which may be recognized as effective in tort cases are that of avoiding international friction with friendly nations, that of protecting lives and property located within the forum's own territory, and by way of reciprocity, lives and property located within the territory of other states, or the interest of keeping one's courts free from complications which might hamper their smooth functioning.

The relation between this last named interest and the alleged interest in universal uniformity of decisions is well discussed by Mr. Hancock in his chapter on substance and procedure. Following Professor W. W. Cook's penetrating criticisms he shows convincingly and in simple, easily understandable language that the traditional pigeon-hole approach is useless and confusing. Aiming at the greatest possible harmony of decision, he advocates the restriction of the application of the *lex fori* to those cases where the application of a foreign law would really be inconsistent with the due and effective administration of justice.

Not quite so satisfactory are Mr. Hancock's efforts to demarcate the application of the conflict of laws rule applicable to tort cases from conflict of laws rules applicable to other problems, for instance problems of the law of family relations, administration or distribution of decedent estates, contracts, etc. As a matter of fact, the problem does not appear as such in Mr. Hancock's book. He deals with it at several places in the chapters concerned with what he calls "multiple contact problems." Under this heading Mr. Hancock brings together three types of cases which seem to this reviewer to be so different from each other that little can be gained from bringing them together under one dominant concept.

The first category of multiple contact problems is constituted by

those cases where the defendant by acting in one state (*X*) causes the plaintiff to be harmed in another state (*Y*). The issues at stake appear in the clearest form when the forum happens to be in a third state (*F*). The place-of-wrong formula cannot be applied until it has been determined which one of the two states, *X* or *Y*, constitutes the place of wrong. Mr. Hancock simply reports the cases, the majority of which seem to fix the place of wrong in *Y*. He seems to approve this result, but he does not tell his readers that it has been reached in the leading cases through one of the worst types of spurious jurisprudence of concepts. A cause of action is said not to arise before some harm has occurred to the plaintiff. Hence, this event not only determines *when* the cause of action arises but also *where* it does.¹⁰ That such reasoning may lead to results incompatible with the principle of protecting the justified expectations of an actor who believes he has complied with all the precepts of the law of the place where he is acting, may be irrelevant to a worshipper of concepts but it should arouse the curiosity of an advocate of the jurisprudence of interests. The place-of-harm approach might perhaps be justified upon a basis of considerations of policy, viz. by preferring a state's interest in the protection of life and property within its borders over an individual's interest in not being disappointed in his confidence in the legitimacy of his conduct. In certain cases it may be possible to reconcile these two interests, viz. in those cases where the circumstances are such that the actor knew, or could reasonably be expected to know, that his conduct might cause harm in another state. In those crucial cases, however, where harm occurred in another state although the defendant could not be reasonably expected to reckon with such a possibility, the decisions have almost unanimously been in favor of the defendant. Those decisions seem to indicate that the courts prefer the interest of an individual's protection of justified expectations not only to another state's interest in the protection of lives and property located therein but also to the interest in universal uniformity of decision.

The second group of multiple contact problems is presented by those cases where an injury to life, health or property has occurred in the course of the performance of a contract, especially of a contract of transportation of passengers, goods or messages. Mr. Hancock seems to favor that approach which classifies such cases as falling simultaneously under the categories of tort and contract and allows the plaintiff to recover whenever his claim appears justified either

¹⁰ Cf. *Alabama Great Southern R. R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892).

under the law governing tort liability or under the law governing liability in contract. This result, which has been reached in common-law countries in a minority of cases, has long prevailed in the conflict of laws of Germany and other European countries and it appears to be well justified under considerations of policy.

The third group of multiple contact problems consists of those cases where it is questionable whether a court should apply to a certain problem the choice-of-law rule ordinarily applied to tort problems or the choice-of-law rule ordinarily applied to other problems, for instance to problems of the law of family relations or the law of decedent estates. Illustrations are presented by such cases as *Buckeye v. Buckeye*¹¹ or *Herzog v. Stern*.¹² In the former case the plaintiff, while riding in the defendant's car, was injured in Illinois. When she sued the defendant in a Wisconsin court she was met (of course, by the defendant's liability insurer) with the defense that her right of action was terminated by the fact that she had married the defendant after the accident and that under the law of Illinois, i.e. the law of the place of wrong, no personal injury actions were permissible between husband and wife. The plaintiff answered that she and her husband were domiciliaries of Wisconsin and that in Wisconsin the common law had been modified to the effect that personal injury actions were no longer prohibited between husband and wife. Faced with the choice between the law of the place of wrong and the law of the domicile the court (at the domicile!) decided in favor of the place of wrong, arguing, in beautiful conceptualism, that no law other than that under which a cause of action arose could possibly determine by what events such cause of action should be terminated.

In *Herzog v. Stern* a domiciliary of New York had negligently caused an accident in Virginia by which plaintiff was injured. The tortfeasor died before suit was commenced and the court in New York had to decide whether the action could be brought against the tortfeasor's estate. Under the law of the place of injury (Virginia) personal injury actions survived against the personal representative, while the New York statute by which the common-law rule of *actio personalis* was abolished expressly excepted personal injury suits from its operation. The New York Court of Appeals, apparently anxious to apply its own law, and finding it difficult to reconcile such a result

¹¹ 203 Wis. 248, 234 N. W. 342 (1931).

¹² 264 N. Y. 379, 191 N. E. 23 (1934), cert. den. 293 U. S. 597, 55 S. Ct. 112 (1935).

with the reigning place-of-wrong dogma, resorted to the ever-ready expedients of public policy and of classifying the problem as one of procedure.

In both situations Mr. Hancock seems to favor the application of the law of the place of wrong, obviously under the influence of his policy of achieving uniformity of decision. With respect to both situations he gives a lucid exposition of the various alternative solutions but he does not inquire into the policy arguments which could be made for or against every one of these solutions. Had he embarked upon such an analysis he might have found a solution of, or at least an approach to, the most basic problem of the conflict of laws with respect to torts, viz. the problem of determining the scope of application of the choice-of-law rule usually applied to torts. Why do so many courts and authors say that ordinarily problems of the law of torts should be decided in accordance with the law of the place of wrong (whatever this term may signify)? If we ask that question we can hardly avoid inquiring into the social function of the law of torts. Why do we have a law of torts at all, and what are its basic principles? We can do here no more than sketch the ways in which the answers to these questions might be found.

The law of torts, so it seems to us, is the body of rules which indicates under what circumstances a person who has suffered a loss can shift such loss to another member of society. In our society the principle still prevails that ordinarily a loss lies where it falls: *Casum sentit dominus*. Only under special circumstances can I shift my loss to another; for instance, when I have contracted with that other that, for valuable consideration, he should take upon him the loss which I have suffered in the first line. Or, when the other, to whom I try to shift my loss, has "caused" it through conduct falling short of the standard to which he is expected to live up, society has found it just and expedient to allow me, the victim, to shift my loss to the fellow citizen who has failed to live up to the standard of the community. If we ask what community's standard a man is expected to live up to, the almost "natural" answer is, the community within which he lives and acts, and, perhaps, also that community within which his conduct may reasonably be expected to produce consequences. Considerations like these constitute the foundation of the rule that problems of the law of torts should be decided in accordance with the law of the place of wrong and they simultaneously determine the scope of application of that rule. Its application is probably justified with respect to all

aspects of the problem of determining the circumstances under which one member of society shall be allowed to shift a loss to another.

When we have to determine whether the rule shall apply to such problems as that of determining whether law suits shall be permissible between husband and wife, we should properly ask ourselves whether this problem is primarily one of loss shifting or one of regulating the relations between the members of a family. For problems of the latter kind we regard as the most appropriate law that of the domicile and that result is reached upon such considerations as the following ones: problems of family relations should as far as possible be determined by one and the same law irrespective of where certain events take place; the structure of the family is of the greatest importance for the general political, social and economic structure of a country and should therefore be determined by no law other than that of the society to which the family belongs; the structure of the family being a product of historical and environmental developments, attempted interferences by a foreign order would appear unjustified or futile or both. Having stated these premises we might then ask whether the permissibility of intrafamily law suits is more appropriately ascribed to the social order generally determining the requirements of loss shifting or to the social order by which the structure of the family is determined. It seems to us that the problem should be stated in some such way by a lawyer who is consistent in his jurisprudence of interests, and if the problem is stated in this way the application of the law of the domicile might well appear better justified than that of the place of wrong.

In a similar order of ideas it might be investigated whether the problem of survival of a tort claim against the estate of the tortfeasor is more within the scope of the choice-of-law rule which, for good reasons, subjects problems of loss shifting to the law of the place of wrong, or within the scope of the rule which, for equally good reasons, subjects problems of the distribution of decedent estates to the law of the domicile of the decedent, or, perhaps, within the rule which, also for good reasons, subjects problems of procedure of administration to the law of the court under whose auspices the administration is being carried on.

The foregoing observations have been made not in a spirit of pointing out shortcomings in the reasoning of the author but rather for the purpose of spinning forth lines of thought which he has indicated himself. His is a suggestive and a clarifying book. His presentation

of such problems as that of substance and procedure, of the relation between workmen's liability statutes and common-law liability of an employer, of determination of facts by judge and jury, or of the role of presumptions is exemplary and of permanent value to practice and theory of the conflict of laws. Mr. Hancock's chapter on the conflict of laws in the federal courts of the United States, although not advancing to the penetrating depths of Professor Cook's recent critique of *Griffin v. McCoach*,¹³ will be of great help to readers in the British Commonwealth of Nations. In his chapter on the United States Supreme Court, Mr. Hancock has emphasized the possibilities of the Court's working toward interstate uniformity of decision rather than sensed behind the Court's most recent opinions that attitude of extreme self-abnegation which has found expression not only in the drastic case of *State Tax Commission of Utah v. Aldrich*,¹⁴ decided after the publication of our book, but also in some earlier decisions.

That Mr. Hancock has not always pursued his own suggestions to further conclusions may be due to self-imposed restraint. All through his book he shows a certain dignified conservatism and reserve. In accord with good British tradition he does not wish to pretend to be wiser than the courts. A certain contradiction between this attitude and his firm criticism of mechanical conceptualism was inevitable. But Mr. Hancock has swept away a mass of cobwebs and in lucid exposition he has unravelled complicated situations and has caused the essential problems of the field to stand out clearly and distinctly.

¹³ "The Federal Courts and the Conflict of Laws," 36 ILL. L. REV. 493 (1942); *Griffin v. McCoach*, 312 U. S. 676, 61 S. Ct. 807 (1941).

¹⁴ (U. S. 1941) 62 S. Ct. 1108.